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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 396

C. J. D. RUDOLPH AND IRMA M. RUDOLPH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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C. J. D. Rudolph and Irma M. Rudolph, Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on June 27, 1961.

OPINIONS BELOW

The opinion and judgment of the Federal District Court (R. 96, 100, Appendix A) is reported in *189 F. Supp. 2 (1960)*. The opinion of the Court of Appeals for the Fifth

Circuit (R. 121), Appendix B), being No. 18788 of that Court, is not yet reported in the official Federal Reporter, but is published in *60-2 U. S. T. C. 9707 (1961)*.

JURISDICTION

The judgment (R. 130, Appendix B) of the Court of Appeals was entered on June 27, 1961. A timely application for rehearing (R. 131) was denied on July 28, 1961 (R. 134, Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether an insurance agent realizes taxable income when the insurance company for which he works pays his and his wife's expenses of traveling to and attending a convention of the company's agents where, because of concern for his economic security, he is compelled by the company to attend, has no control over the mode of travel, accommodation or activities, and the convention is designed and intended primarily for the business purposes of the company not as compensation to the agent.

2. Whether, in the alternative, the reasonable expenses of an insurance agent in traveling to and attending a convention of agents of the insurance company for which he works constitute ordinary and necessary expenses of carrying on a trade or business where the business of the convention is directly related to his job and where, because of concern for his economic security, he is compelled by the company to attend.

3. Whether, in the alternative, the reasonable expenses of an agent in bringing his wife to a business convention under the foregoing circumstances constitute ordinary and necessary expenses of carrying on a trade or business where, as part of a long-range and continuous program of business education, the company expects that the wife attend and would view with disfavor her failure to attend without adequate reason.

STATUTES INVOLVED

Internal Revenue Code (1954), Section 61. 26 U. S. C. 61.

Internal Revenue Code (1954), Section 62(1) and (2). 26 U. S. C. 62(1) and (2).

Internal Revenue Code (1954), Section 63(a). 26 U. S. C. 63(a).

Internal Revenue Code (1954), Section 161. 26 U. S. C. 161.

Internal Revenue Code (1954), Section 162(a). 26 U. S. C. 162(a).

REGULATIONS INVOLVED

U. S. Treas. Reg., §1.62-1(a) (1954), 26 C. F. R. §1.62-1(a).

U. S. Treas. Reg., §1.62-1(c) (1) (1954), 26 C. F. R. §1.62-1(c) (1).

U. S. Treas. Reg., §1.162-2 (1954), 26 C. F. R. §1.162-2.

STATEMENT OF THE CASE

Petitioners instituted suit on October 9, 1959 (R. 20) in the Federal District Court for the Northern District of Texas against Respondent to recover $126.90 in income tax, together with interest thereon in the amount of $10.19, for the calendar year 1956, which was illegally and erroneously assessed against and collected from Petitioners by the District Director of Internal Revenue for the district in which Petitioners reside (R. 9). The cause came to trial before Honorable T. Whitfield Davidson, sitting without a jury, and on September 28, 1960, judgment was entered for Respondent (R.).

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit, and on June 27, 1961, that Court affirmed the judgment of the trial court per curiam, one Judge dissenting (R. 130, Appendix B).

Petitioners timely filed their joint Federal income tax return for the calendar year 1956 (R. 17), and duly paid the tax thereon. Subsequent thereto, the Commissioner of Internal Revenue assessed a deficiency in income tax against Petitioners in respect of said calendar year 1956 in the amount of $126.90. The deficiency resulted from the inclusion by the Commissioner in Petitioners' income of expenses paid by Southland Life Insurance Company (sometimes hereinafter referred to as the "Company") in connection with Petitioners' travel to and attendance at a business convention organized, sponsored and conducted by the Company and held in New York City from December 13 to December 16, 1956 (R. 104). Petitioners paid the assessed deficiency in income tax,

together with interest thereon, and filed a Claim for Refund. The Claim for Refund was denied, and Petitioners filed suit in this cause (R. 20).

Petitioner, C. J. D. Rudolph, has worked for the Company since September 14, 1932 (R. 16), as an ordinary life insurance agent (R. 42). He is an independent contractor and not an employee of the company.

All aspects of the convention were determined by the Company, including the time, place, location, character of hotel accommodations for those attending, and all activities at the convention (R. 22). The Company also chartered special trains to provide transportation to the convention, and all persons attending were required to abide by travel and accommodation arrangements prescribed by the Company (R. 21, 22). Petitioners spent approximately 84 hours on the chartered trains, during which time they had the opportunity to exchange ideas and discuss mutual problems with other agents and their wives and with senior officers of the Company (R. 27).

The entire expense attributable to Petitioners' travel to and attendance at the convention, with the exception of $30.00 given to Petitioners' as an allowance for unplanned meals in New York City, was paid directly by the Company (R. 22). The parties have agreed that the total amount of travel and convention expenses allocated to Petitioners was approximately $560.00 (R. 58), and it is the inclusion of this amount of income which produced the asserted deficiency in income tax of $126.90. Respondent concedes the reasonableness of the expense.

The Company sponsors a national convention approximately every eighteen months (R. 29) to serve a business function deemed essential by the management of the Company in the training of its agents and to the continued growth of the Company itself (R. 50, 62). The convention permits the Senior officers of the Company to acquaint themselves on a personal basis with the Company's agents, to participate in close informal discussions and guidance pertaining to the agent's job, and to report the accomplishments of the past and the projections and objections for the ensuing year (R.). The convention provides professional instruction by outstanding representatives of management and selling in a setting away from the usual concerns of business (R. 73, 78). And above all, the close association and contact among agents and Company officials and discussion of common problems with others similarly situated helps agents to learn tried or new methods of best performing their jobs and gives them appreciation of their mutual problems (R. 27). The Vice-President thought the informal contacts among fellow agents to be the most important aspects of the convention business (R. 74).

The agents attending the Convention are chosen by the Company in accordance with certain preannounced standards (R. 36), which vary from year to year but which are always based in some manner on the production and conservation of life insurance (R. 54, 72). The standards are determined so as to secure a cross section of the agents who are most likely to benefit from the professional instructions, association and

information provided at the Convention and who, therefore, are most likely to contribute to the continued success of the Company (R. 21, 72).

Even though an agent qualifies to attend the convention, he may not attend unless he is invited by the Company (R. 54). Those agents invited are required to attend, and adequate reasons must be presented if an agent or his wife cannot attend (R. 25, 63, 73). Agency contracts are terminable at will, or on short notice (R. 45, 46).

If an agent is invited to attend a Company convention but declines or fails to attend, he receives no cash, cash equivalent, bonus, award, compensation or other benefit (R. 31, 63).

The Company considers that an agent's wife plays an important role in his career (R. 61). The insurance agent's wife's role in personal contacts, community projects, civic enterprises, and other areas of community life are of tremendous importance to the success or failure of the agent, and therefore, of his ultimate worth to himself and to his company (R. 46). The Conventions sponsored by the Company are so designed and prepared as to furnish a program of instruction and association with other wives which serve to teach an agent's wife how to help her husband (R. 62). The attendance of an agent's wife is deemed highly desirable by the Company's management (R. 52). So vital does Southland consider the wife's part in its business that upon the employment of an agent the Company requires an interview with the wife in the home to assure she is made aware of the

contribution which she may make to her husband's success. The Company distributes a booklet, *A New Partnership Has Been Formed*, to the wives which evidences its interest in stimulating the wife's role in the selling of insurance (R. 61). In addition, letters are occasionally written to the wife concerning any special sales effort that might be desired or promoted (R. 62). The Company has a monthly publication for the agents and employees that is mailed to their homes so that the wife will have a convenient opportunity to see the magazine and read it (R. 62). Furthermore, the Company has determined that the presence of the wives at the Convention keeps the meetings pitched on a high and attentive plane, where the purpose of the Convention is best served (R. 62). The Company provided no liquor and no cocktail parties were held (R. 46).

Mr. J. Harry Wood, Managing Director of the Life Insurance Agency Management Association, testified that it was wise business practice to have an agent's wife at a convention and to indoctrinate her with her prospects and responsibilities as the wife of an insurance agent (R. 84, 85).

Conventions of a similar nature are traditional in the life insurance industry, having been common long before income taxes were a major business consideration, and are held by most, if not all, of the life insurance companies (R. 78).

New York City was selected as the convention site by management of the Company because of convenient transportation facilities, adequate hotel accommodations, accessibility to guest speakers, and interest as a convention center (R. 67, 68).

Petitioners left Dallas by special trains on June 11, 1956, and arrived in New York on the evening of December 13 (R. 104). The business session of the convention commenced at 9:30 A.M. on December 14, and followed the agenda set forth hereinafter (R. 108, 109). First, there was an invocation, by Neal H. Wright, Lubbock, Texas, followed by an address, "Welcome to New York", by Ben H. Carpenter, Executive Vice President. There followed a panel discussion of agents with the theme "Success Through Planning", in which some of the leading agents of the Company participated. Glenn M. Brooks, Vice President and Director of A & H Insurance, spoke on "The 1957 Agency Activity Program", and Dan C. Williams, President of the Company, addressed those attending on "Our Southland Life Future". John W. Carpenter, Chairman of the Board, then discussed "Your Company and Mine", after which the meeting was adjourned at 12:30 P.M. to luncheon in the Sert Room. Presiding at the luncheon was Field Scoville, Vice President and Superintendent of Ordinary Agencies, who introduced the principal speaker of the convention, Dr. Norman Vincent Peale. In accordance with written suggestions (R. 111) to talk about the lines of achievement, success and happiness that can be attained through proper attitudes of faith and practices of the well ordered personal life, Dr. Peale spoke about "Success Through Right Thinking". Other activities at the convention included a sight-seeing tour beginning at 2:30 P.M. and ending about 5:30 P.M. on December 14 (R. 104); a breakfast and fashion show for

ladies only at 8:45 A.M. on December 15 (R. 105), and an evening at the Copacabana, beginning at 6:30 P.M. on the same day (R. 106). Free time was also scheduled, so that the agents and their wives in attendance might be able to see a special Christmas show at Radio City Music Hall, radio and television shows, or other points of interest (R. 106). The various activities of the convention could not and did not detract from the primary business of stimulating the enthusiasm of the agents and encouraging their discussion of the means and methods of selling life insurance with other agents (R. 28, 90); rather, the activities were so designed to accomplish this very end (R. 84). Petitioners returned home by special trains, leaving New York on December 16 and arriving in Dallas on December 18.

The convention was not considered and did not, in fact, constitute any part of the agent's vacation. Petitioner, C. J. D. Rudolph, testified that "Whenever I take a trip I like to get away from it all, not have any schedule, and do as I please (R. 46)."

The District Court held that the Company was "just doing a gracious, magnanimous thing of awarding those leading agents a trip", and that the value of that trip was income in "the nature of a bonus, reward, and compensation for a job well done." On the other hand, the District Court denied a deduction to Petitioners for a like amount on the ground that the trip was primarily "a pleasure trip in the nature of a vacation". The Court of Appeals for the Fifth Circuit affirmed in reliance upon its prior decision in *Patterson v. Thomas,* *F. 2d* , *61-1 U.S.T.C. 9310 (5th Cir.*

3/16/61), with Honorable John R. Brown, stating in dissent "Here, in my judgment, these facts show an honest, legitimate, ethical, expense. More than that these facts compel a finding of absolute business compulsion when viewed from the standpoint of the agent's economic security."

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals presents for the first time the issue of whether an employee realizes taxable income when his employer requires him and his wife to attend a business convention of such employees and pays their expenses in connection therewith, which issue is of such widespread importance to individual taxpayers and the general business community as to warrant review and resolution by this Court.

2. The decision of the Court of Appeals likewise presents for the first time the issue of whether an employee may deduct as ordinary and necessary business expenses the expenses which, at the direction of his employer, he is compelled to incur in traveling to and attending a business convention of the employer's employees, which issue is of equally widespread importance and should be resolved by this Court.

3. Finally, the decision of the Court of Appeals presents for the first time the issue of whether an employee may deduct as ordinary and necessary business expenses the expenses which, at the direction of his employer, he is compelled to incur in bringing his wife to a business convention of the employer's employees.

I.

The issues herein presented have never been considered by the Court, although it has enunciated basic principles which bear directly on their resolution.[1] The amount of tax involved in this case is small, and the issues are deceptively simple. It is manifest, however, that no tax case in recent years will have a more widespread effect on taxpayers and business than will the instant case, and that the issues go to the very essence of our concepts of income and deduction. More directly, it will materially affect the traditional method chosen by life insurance companies to encourage and educate their agents and thereby to promote the financial success of the companies. Two phenomenon of everyday business life—the company convention and the mandatory invitation by the company for the employee to participate in its affairs—are here subject to scrutiny by the Court, and a decision on the questions presented will test whether, in the absence of specific congressional disapproval, the courts, in applying the taxing statutes, can ignore the business realities of these phenomenon and substitute their own judgment for that of management.

The District Court held, and the Court of Appeals affirmed, that the trip was in the nature of a bonus or compensation, despite uncontroverted testimony to the contrary by the Company's representatives and by an independent expert in the field. There was ample evidence before the Court that the Company's decision to hold the convention was based upon

[1] It is intriguing to note that Petitioners' position appears never to have been challenged previously by the Internal Revenue Service, although conventions of life insurance agents have been prevalent since 1924. See Report No. 15, Life Insurance Sales Research Bureau (November, 1924).

the desire, as a matter of business judgment after long individual and nationwide experience, to instruct the agents, to build morale, create enthusiasm and interest in sales promotion, enlist the aid of the wives, and in general further the business of the agents and Company. Respondent would make much of the fact that the agents invited were selected on the basis of production, but this was nothing more than an intelligent and practical method for choosing the agents who would most benefit by the convention[2].

This Court recently had occasion to reiterate the importance of looking to the intent of the payor or transferor in determining the taxability of the recipient. The question before the Court in *Commissioner v. Duberstein, 362 U. S. 278 (1960)*, was whether a Cadillac received by a taxpayer from a business associate constituted a gift or taxable compensation. In rejecting the Government's insistence on a new and broad test, the Court said:

> "We take it that the proper criterion, established by decision here, is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer. Further than that we do not think we can profitably go."

So it is here. The intent of the Company in paying the convention expenses of Petitioners is of vital significance, yet the Court of Appeals apparently dismissed this fact without consideration. Unless the uncontradicted testimony before

[2] "What type of person are you going to invite to your conference? Can you draw up a specification of the sort of person you believe will contribute the most?

"What you want is a group of experienced people with keen minds, who are determined to find out all they can about the problem and contribute on the basis of that knowledge to its solution." The Royal Bank of Canada Monthly Letter, Vol. 39, No. 2, page 1 (February, 1958).

the Court is to be disregarded entirely, a determination must be made whether the payment of Petitioners' convention expenses constitute income to them *notwithstanding the absence of any intent to compensate*. Stated otherwise, Petitioners find no argument with the proposition that intended compensation not expressly excluded by Congress is includible in income regardless of the nature or form which such compensation may take. However, where the value of expenses incurred by the Company (and Respondent concedes same to be deductible by the Company) for its benefit are not intended as compensation to one who happens to be the object of those expenditures, all the attendant facts and circumstances (including the nature of the thing received and the dominant purpose of the payor) must be examined in order to decide whether or not under our scheme of taxation the recipient constructively realizes taxable income.

It is axiomatic that not every economic gain or intangible benefit received by a taxpayer falls within the generic concept of income for Federal income tax purposes. Thus, meals and lodging furnished to an employee for the convenience of the employer were long determined by the courts not to represent the receipt of income. See *2 Mertens, Law of Federal Income Taxation*, §*11.16*. This judicial conclusion is in no way contradictory to the fact there is an element of gain to the employee in that he received substinence and quarters which he otherwise would have had to supply for himself. He had nothing he could take, appropriate, use and expend according to his own discretion rather, the ends of the employer's business dominated and controlled, just as in the furnishing of a

place to work and in the supplying of tools and machinery to work with. That personal needs or wants of the employee were satisfied was merely incidental to the business of the employer.

Likewise, the furnishing of so-called "fringe benefits" to employees at the place of work such as a library, swimming pool, parking facilities, air conditioning, etc., do not constitute income pro rata to the employees. Nor does special instruction or training provided on or off the employer's premises constitute income, although obviously the employee benefits therefrom. One may attend a professional convention and gain new knowledge at the expense of the employer, but this is not taxable income.

The very heart of the logic is this: there are certain economic or intangible benefits an employer may provide for his employees which do not constitute income to the employees because the value thereof is subjective, because the employees lack discretion or control of over their selection, and *because the underlying objective is not to compensate the employee but to further the business of the employer.*

Petitioners do not intend to suggest that they fall within the ambit of Section 119, IRC of 1954; obviously, that section pertains only to meals furnished on the premises or lodging furnished on the premises as a condition to employment. But section 119 was designed to codify the law in a narrowly-defined area. See Sen. Rep. No. 1622, 83rd Cong., 2d Sess., p. 190. Prior to the enactment of Section 119, the taxability of meals and lodging furnished to employees turned on two

points: (1) were the meals and lodging intended as compensation, and if not (2) were they furnished for the convenience of the employer. See Mim. 6472, 1950-1 Cum. Bull. 15. The cases and rulings indicate that meals and lodging not intended as compensation and meeting the convenience test did not constitute income to the employee. See *2 Mertens, supra.* Thus, it must be conceded that *certain* benefits conferred by an employer upon an employee do lie beyond the framework of taxable income where the purpose thereof is to benefit the employer's business.

Has this been changed? Section 119 codified the case law, and modified it to the extent of eliminating the fact question of intent to compensate as a determinant where meals and lodging are furnished in kind. But it did not destroy the rationale of earlier decisions on the question as valuable precedent in related or analogous areas; indeed, the Committee Reports and the Commissioner's own regulations recognize that today cash allowances for meals and lodging are includible in income *only to the extent that such allowances represent compensation.* See Sen. Rep. No. 1622, *supra;* Reg. §1.119-1(c)(2).

In the instant case, Petitioners received nothing over which they had control; they did not select the convention site or mode of travel, nor did they choose the activities of the convention. Whatever benefits or gains they derived from attending were subjective; whatever benefits or gains they derived were incidental to and dictated by dominant business reasons arrived at in good faith by the Company. This is not income under the Internal Revenue Code.

II.

Section 63(a), contained in Part I, Subchapter B, Chapter 1, IRC of 1954, specifies that "the term 'taxable income' means gross income, minus the deductions allowed by this chapter * * *." Section 161, contained in Part VI, Subchapter B, of Chapter 1 provides that in computing taxable income under section 63(a) "there shall be allowed as deductions the items specified in this part * * *." Section 162 enumerates certain trade or business expenses which fall within the foregoing provisions:

> "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> "(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;"

There is no dispute in the instant case about the reasonableness of the expenditures, nor that the Petitioner, C. J. D. Rudolph, carried on a trade or business as an insurance agent.[3] Moreover, it is obvious that Petitioners were away from home. Thus, in ruling on the deductibility of Petitioners' expenses three questions must be answered: (1) were the expenditures ordinary; (2) were they necessary; and (3) were they incurred in connection with Petitioners' pursuit of his trade or business? In seeking a decision on these ques-

[3]Although C. J. D. Rudolph is referred to for convenience as an employee of the Company in the sense that he is employed on a continuing basis as a commissioned agent, his legal status is that of an independent contractor.

tions "Life in all its fullness must supply the answer to the riddle." *Welch v. Helvering, 290 U. S. 111, 54 S. Ct. 8 (1933).*

"Ordinary" expenses are not necessarily habitual or normal expenses in the sense that the same taxpayer will have to make them often. *Welch v. Helvering, supra. Rolunson Land & Lumber Company of Alabama v. United States, 112 F. Supp. 33 (S. D. Ala. 1953); Canton Cotton Mills v. United States, 94 F. Supp. 561 (Ct. Cl. 1951).* The term "ordinary and necessary expense", however, must be given its natural and common connotation. *Tinkoff v. Commissioner, 120 F. 2d 564 (7th Cir. 1941).* An ordinary expense may be one which happens but once in the taxpayer's lifetime if it is a common or frequent occurrence in the type of business in which the expenses are incurred. *Deputy v. DuPont, 308 U. S. 488, 60 S. Ct. 363 (1940).* The test of a deduction made as an ordinary and necessary expense in carrying on a trade or business is said to be its natural normality and soundness as a business expenditure, in both nature and amount, by general commercial standards, in practical application to the specific situation. *Bryers v. Commissioner, 199 F. 2d 273 (8th Cir. 1952).* Whether an expenditure is both ordinary and necessary will depend upon whether the "average hard-headed businessman" might have made the expenditure. See *4 Mertens, Law of Federal Income Taxation, §25.09 at 34.*

The evidence of customs and actions of organized professional organizations is admissible on the issue of whether certain expenses of a member of that profession at a given time and place are deductible as an ordinary and necessary

business expense. *Lilly v. Commissioner, 343 U. S. 90, 72 S. Ct. 497 (1952).* One criterion set up in the Regulations is that there be a "sufficient" relationship between the taxpayer's trade or business and his attendance at the convention. In *Pacific Grape Products Company, 17 T. C. 1097 (1952)*, the expenses of a corporation for travel of employees to schools where annual refresher courses were given, acquainting the employees with new processes in the industry and for travel and contacting financial sources and in conforming with governmental regulatory bodies were held to be a business purpose.

The cases are legion which establish that expenses incurred in connection with attendance at professional, business or technical conventions are "ordinary and necessary" in our contemporary society and business community and therefore constitute allowable deductions. A furniture store was permitted to deduct its costs for sending its buyers to the annual furniture mart. *Finkenburg's Sons, Inc., 17 T.C. 973 (1952).* The expense of sending representatives to annual conventions of trade associations has been held as a policy matter by the Internal Revenue Service to be deductible. I. T. 2602, 1931 Cum. Bull. 130. The expense of sending representatives to the conventions of the Chambers of Commerce of the United States has been ruled to be deductible in a letter signed by C. R. Nash, Assistant to the Commissioner, in reply to a letter for that purpose dated December 22, 1926. Expenses of physicians in attending meetings of medical societies are held to be deductible. *Wolfe v. McCaughn, 17 AFTR 1007*

(E. D. Pa. 1933); Robert C. Doffey, 21 B. T. A. 1242 (1931); Ray Upham, 16 B. T. A. 950 (1929); J. Bentley Squire, 13 B. T. A. 1223 (1928); Cecil M. Jack, 13 B. T. A. 826 (1928).

Others whose expenses in attending conventions and meetings have been held deductible are: Lawyers, *Wade H. Ellis, 15 B. T. A. 1075, aff'd, 50 F. 2d 343 (1929);* Clergymen, *Marion D. Shutter, 2 B. T. A. 23 (1925);* University professors in attending scientific conventions, *Alexander Silverman, 6 B. T. A. 1323 (1927);* Secretaries in attending a convention of the National Secretaries Association, *Rita N. Callinan, 1953 P-H T. C. Memo, Dec. 53,055; Charles O. Gunther, Jr., 1954 P-H T. C. Memo, Dec. 54,287;* Professional cartoonists in attending political conventions for purposes of gathering information necessary in his professional activities, *J. N. Dowling, 4 B. T. A. 499 (1926);* Motion picture stunt actors, *Charles Hutchison, 13 B. T. A. 1187 (1929);* Insurance agent away from home on business, *Summerour v. Allen, 99 F. Supp. 318 (M. D. Ga. 1951);* Lay member of a church attending a church convention, Rev. Rul. 58-240, 1958-1 Cum. Bull. 141; Legionaire attending American Legion Convention, *Henry Carton, 30 T. C. 28 (1958);* Lawyer attending tax institute, *Caughlin v. Commissioner, 203 F. 2d 307 (2d Cir. 1953).*

The instant case is unique and differs from those cited above in that the purpose of the convention was to bring together the scattered employees of a single large business concern rather than independent members of a particular

profession or vocation or people having some common but otherwise unrelated business interest.[4] This is the first time (together with *Patterson v. Thomas*, *supra*), that such a convention has been subject to analysis by this or any other court with reference to the "ordinary and necessary" requirement for business deductions.[5] However, since 1924 life insurance companies have almost universally sponsored conventions of the type here involved, based upon the business decision that the agents, and thereby the companies, benefit from the knowledge and motivation derived by the agents from the convention.[6] It seems reasonable to assume, therefore, that C. J. D. Rudolph's expenditures were as "ordinary and necessary" as were those of the taxpayers in each of the foregoing cases, if attendance at the convention was in pursuit of his trade or business.

Thus, the issues have been narrowed to one final inquiry: was the dominant purpose and motive of Petitioners in attending the convention one of business or pleasure? Reg. §1.162-2(d) provides that:

> "Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under section 162 depending upon the facts and circumstances of each

[4]See Rev. Rul. 59-316, 1959-2 Cum. Bull. 57, in which it is indicated that the taxpayer claiming a deduction for expenses incurred in connection with attending a convention must show that he attended to further his own business. See also Rev. Rul. 60-16, 1960-1 Cum. Bull. 58, wherein it is suggested that an employee may deduct in computing adjusted gross income the expenses which he incurs in the performance of services as an employee in attending a business convention.

[5]The Commissioner of Internal Revenue recently announced that he acquiesced in the deduction of expenses incurred by individuals in attending conventions of the National Association of Internal Revenue Employees (a convention of employees of a single organization). CCH Fed. Tax Serv., Current Report No. 23, April 19, 1961.

[6]See Life Insurance Sales Research Bureau, Report No. 15 (November, 1924); Appendix E, page 76.

> case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance. If the convention is for political, social or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible."

The Internal Revenue Service ostensibly reads into the foregoing regulation a requirement of primacy, as spelled out in Reg. §1.162-2(b)(1):

> "If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible."

It cannot be questioned that the formal business sessions of the convention (as summarized in The Statement of the Case) were directly and materially related to C. J. D. Rudolph's trade or business—in fact, his trade or business was the very subject and theme of those sessions. However, in finding that the trip was primarily for pleasure the Internal

Revenue Service, and later both the District Court and the Court of Appeals, attached great significance to the relative times spent in formal session, travel and other activities and to the fact that the convention was held in New York.[7] The basis for this rationalization, at least in part, apparently is Reg. §1.162-2(b)(2):

> "Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly related to his trade or business and subsequently spends an additional five weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of a clear showing to the contrary."

There are two obvious and fundamental errors in applying to the instant facts a comparative analysis as suggested in the regulations, since such an analysis would ignore the business purpose of the Company, the format of the convention trip, the industry-wide practice and the practical compulsion to attend, in determining whether Petitioners' expenses are deductible.

First, the court below emphasized the relative times spent on planned entertainment, informal activities, and formal

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[7] *But cf.* News Release, IR-394, August 3, 1961, 4 P-H Fed. Tax Serv., par. 32,375, wherein it was stated: "He [the Commissioner] said an analysis of a large group of cases from all parts of the country involving a variety of travel and entertainment expenses did not reveal that any expenses were disallowed merely because of the site of a convention or meeting. * * *"

business sessions, as if this breakdown was conclusive evidence of a non-business purpose. Furthermore, the court apparently viewed the activity of travel and time spent in traveling as more or less neutral factors, the costs of which derive their tax significance from the nature of the primary activity at the destination.

The court's interpretation of the statute is inapposite to the situation before the Court, and any distinction between the travel, entertainment and informal times, on the one hand, and the formal business sessions, on the other hand, is ill-founded. This is not a case where the taxpayer and his wife embarked on a pleasure jaunt independently of any planned program and at their destination incidentally engaged in business. Here, the Petitioners had no discretion as to the mode and time of transportation, their accommodations, the activities of the convention, or any other control over the determinations of the Company as to what was in its best interest. Here, the entire convention (from the moment of the agents' departure to the time of his return to his place of business) and the objectives and business purpose of the Company are in issue.

Petitioners spent almost five full days in the enforced and close companionship of specially chartered trains, during which time the sale of life insurance was the dominant topic of conversation.* This was normal, expected and intended by the Company; it was not mere happenstance that the Company *required* all those attending the convention to travel together. Similarly, the time spent in informal activity did

*See Appendix E, page 77.

not detract from the business character of the convention. Although the formal meetings lend continuity to the convention and obviously play an integral part in the instruction and motivation of the agents, perhaps the most invaluable lessons are learned through the give and take of casual conversation among agents. When lawyers get together they talk law; when doctors get together they talk medicine; when insurance men get together, particularly under the circumstances here involved, they talk insurance. Every lawyer knows that the principal benefit of attending a Bar Convention is not derived from what formal lectures are scheduled but rather from the personal relationship among fellow members of the Bar—talk of a new case, an unusual agreement; talk of common problems; talk about economics of the profession. This was part of the stimulus which the Company wanted to provide. This was the very objective which, through balanced programming, the company desired to achieve.[9] From the moment that the agents and officers of the Company, and their respective wives, boarded the train, to the moment that they returned to Dallas, a dominant business purpose was interwoven into all their activities. The exchange of ideas and methods in informal conversation was as much a part of the plan as the formal meetings.

Second, it is one thing to characterize a particular activity as being essentially personal or for business when viewed from the standpoint of preconceived contemporary ideas *where such activity is undertaken voluntarily by the taxpayer.*

[9]Entertainment at a convention is based upon the realization that the delegates are human beings and not mere mechanical cogs in the company's machine. As such, it has a place in every convention, regardless of size. See Life Insurance Sales Research Bureau, *supra* n. 6.

It is an entirely different thing *when the activity in question is undertaken not voluntarily but as a matter of absolute business compulsion.* To pose a hypothetical situation, suppose that Mr. Doe is ordered by his employer to entertain an important visiting executive at the country club and to play a round of golf with him. Mr. Doe may or may not like to play golf, and he may or may not like the atmosphere or food at the country club. The payment of his expenses should not be income to him in the first instance, but if it is, he should be allowed a deduction for a like amount because he did not engage in the activities to satisfy his personal whims or desires, but rather to fulfill his business obligations to his employer. The fact that he actually liked to play golf, and therefore enjoyed himself, is irrelevant to the tax consequences of his expenditures.

In the instant case, C. J. D. Rudolph's agency contract was terminable at will, and he knew that the Company expected him to attend the convention. Refusal to attend without adequate reason would be tantamount to placing his economic security and association with the Company on the chopping block. His decision to attend was a natural and prudent businessman's response to the dictates of his employer. What more does the law demand? As Honorable John R. Brown said in dissent "In a real and vital sense the money is spent for business and business reasons only. It is indispensable. What is indispensable is certainly ordinary and necessary." Certainly, what is indispensable to his business is in pursuit of his business. If the management of a successful company believes that is the best way to further its business, and if the agents attend the convention not only

because of the implied command but also because their own business is furthered, then the courts should not strike down the decision of management and reasonable business men in order to substitute that of their own—particularly when the decisions to hold and attend conventions have been accepted for thirty years or more by a nationwide industry as a valuable method of promoting their business, instructing their agents, and assuring better service for policy holders.[10]

The suggestion that an employer's good faith demands may be disregarded in determining whether an expendtiure incurred by an employee in direct response to those demands is an ordinary and necessary business expense has tremendous ramifications. This general question, and the more particular application thereof with respect to compelled attendance at company conventions, should be resolved now by this Court.

III.

The expenditures attributable to Irma M. Rudolph are ordinary and necessary business expenses for the same reasons that the expenditures attributable to her husband are properly so classified. It is recognized that a wife's expenses on a business trip are deductible if her presence has a bona

[10] See Appendix E. The tax treatment accorded the agents is very material to the Company's objective in sponsoring the convention. The Company has concluded, over long years of experience, that its conventions serve an important business purpose, and neither the Company nor the agents consider the conventions to be a vacation. The Company has already heard expressions of discontent that if the agents are to be charged with income and allowed no corresponding deduction for attending a business convention, they would rather take a real vacation of their own choosing, instead of paying a tax penalty for attending a convention at the Company's behest. In other words, the business purpose of the Company will be seriously impaired by the imposition upon the agents of a tax based upon conclusions of fact contrary to the expressed intent of both the Company and the agents. This would seem an unwarranted erosion of business prerogative.

fide business purpose, see *U. S. Treas. Reg. 1.162-2(c)(1954)*, and this determination must be made in light of all the facts bearing upon her presence. It is evident from the testimony before the Court (R. 61), that the Company makes a conscientious and sustained effort to bring the agents' wives into the Company family, and to advise them in a practical manner about the ways they may help their husbands. The Company's efforts in this behalf were not casual and offhand, but were deliberate and carefully considered to achieve their purpose. This has been true on an industrywide basis for years antedating the advent of high taxes![11] The Company expected C. J. D. Rudolph's wife to attend, and this expectation was not taken lightly by him or the other agents.

If an employee's wife attends a business convention under the guise of a business purpose when in reality the trip is personal, her expenses should not be deductible. But where the Company commands that a wife attend, not for the purpose of offering disguised compensation but for its own legitimate business reasons, and the employee acts in response to that command, the wife's expenses are and should be deductible as ordinary and necessary business expenses.[12]

[11] See Appendix E, page 78.

[12] See Remarks by Joseph E. Tansill, 14 Journal of Taxation 201, 202.

"Expenses of wives of employees paid by the employer, in attending conventions, * * * seem to constitute another area of spotty enforcement when various parts of the country are contrasted with each other. There are variations among agents in the same district, of course, so that complete uniformity does not exist, but in general it appears that the Middle West has been more vigorous than some other areas on the question of the expense account problems, including wives expenses. *Litigation may ultimately be required to settle these questions*, where the wife's presence is a 'command performance' * * * or where the wife does in fact perform an important function. * * * Modern corporate philosophy regards a key employee's wife as an indispensible member of the team, and many a promising career has been blocked because the individual's wife doesn't measure up."

CONCLUSION

It is Petitioner's belief, based upon Respondent's failure to question the agents of other insurance companies about similar conventions, that Petitioners (and the taxpayers in the *Thomas* case) have been singled out to test Respondent's interpretation of the law. Your review and resolution of the questions presented will not only serve therefor as a greatly needed and lasting guidepost to business in determining the tax effect of its customary actions upon its employees, but will stem in advance the unnecessary flood-tide of litigation which is certain to result from the decisions of the Court of Appeals.[13] If the questions herein presented are not now resolved by this Court, Respondent will doubtless assess deficiencies against untold numbers of taxpayers throughout the United States based upon the decision of the Court of Appeals. For these and the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

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[13]The response to attack on the legitimacy of business conventions has been vigorous. See, *e.g.*, Appendix E, pages 82 and 83.

AFFIDAVIT OF SERVICE

STATE OF TEXAS }
COUNTY OF DALLAS }

I, FELIX ATWOOD, counsel for Petitioners, do hereby certify that service of four copies of the foregoing Petition for Writ of Certiorari has been made on Respondent by mail in accordance with Rule 33 of the Rules of this Court.

Dated this day of ~~August~~ September, 1961.

FELIX ATWOOD,
Attorney for Petitioners.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF DALLAS
DALLAS DIVISION

Civil Action No. 8317

C. J. D. RUDOLPH AND IRMA M. RUDOLPH,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

OPINION OF THE COURT

DAVIDSON, District Judge: This is an action by the plaintiffs to recover $126.90 in income taxes and $10.19 of interest, together with interest on such sum. Plaintiffs were assessed and paid such amount and bring this suit to recover the payment so made.

The deficiency in such amount was assessed on the theory that the $560.00 admitted value of an all expense paid trip from Dallas, Texas to New York City, taken by the plaintiffs, husband and wife, in 1956, and paid for by the Southland Life Insurance Company, was includible in the income of the plaintiffs, and as a personal expense was not deductible by them as an ordinary and necessary business expense. Plaintiffs contend that the value of such trip was not income to them, and even if it were, that they are entitled to deduct its value as an ordinary and necessary business expense. Plaintiff, C. J. D. Rudolph is an insurance agent selling for Southland. He qualified to attend

Southland's convention in New York City and also to take his wife along by virtue of selling the requisite amount of insurance as determined by Southland. The convention trip consumed five or six days. Of this time, one morning session was devoted to a business meeting, followed by a business luncheon. The remaining time was devoted to travel, sightseeing, entertainment, fellowship or free time.

There are certain well settled propositions of law we might gather our thoughts and reasons from. One is that a bonus paid to an employee is part of his income, just like a tip paid to a waitress is part of her income.

It is likewise a settled proposition of law that an employer may assemble his employees for the purpose of training and instructing them, and the expenses that he goes to or to reimburse them for the expense they went to in coming to the meeting is a legitimate expense of the company, and no gain to the employee in a monetary way.

Now the reasoning from these two propositions—let us see what is true here.

The recent Alabama case, *Thomas v. Patterson*, a November 1959 decision of the United States District Court for the Northern District of Alabama, was for attending a convention at Fort Monroe in Virginia. It does not appear where the office of the company is—the insurance company—it does not appear where the territory of the company is. So far as the information is concerned, much of its business might be around and about Fort Monroe. Therefore, selection of that place would be in line with ordinary business economy.

In any event, we are concerned with whether plaintiffs in this case must include the value of the tr in their income and if so, whether or not they are entitled to a business expense deduction. We are not concerned with the deductibility of the convention's cost by the insurance company. It is the purpose of the convention to the taxpayers which govern our action, not the purpose of the insurance company in holding them.

We will assume that the company here has a larger part of its business in Texas and adjoining states. Primarily, the place of the home office would be the place where the agents would be called to as a *business* proposition to receive instruction and to be taught.

Suppose there was a lot of business down and around San Antonio. To break the monotony to a degree, the convention might be held in San Antonio, or in Houston, or might be held in Oklahoma City. But what business reason is there for holding a convention in a place as far away as New York; and certainly, what business reason is there for holding a convention in Havana, Cuba. It was not held down there for educational purposes in insurance.

Assume that it was to a degree; what was the primary purpose of the trip? It was a reward, or a bonus given to the employees for excellence in service. If it was purely educational, it might be held here in Dallas and those who did not attain such a high rating might have the benefit of the program at the convention.

All of the evidence considered, we think it irrefutably leads to this conclusion: That the insurance company was just doing a gracious, magnanimous thing of awarding those leading agents a trip just as much as if it had awarded them an automobile, or suit of clothes; similarly the plaintiff and the other leading agents of Southland were awarded this trip to New York, and the trip to New York cost Southland $80,000.

The Court's conclusion is that the holding of these conventions generally, and especially the holding of them at remote places, have the primary purpose of affording a pleasure trip which the agent himself, to enjoy, would have paid out of his own funds if the company had not given it to him, which is in every way in the nature of a reward that would be a bonus.

Suppose they had offered it to a man in this manner: At the first of a given period, let's say the first of the year, to all those that write over $100,000 insurance, let's say, we will either give you a free trip to Paris, France, or we will give you a bonus of $500. You can exercise your choice; either one would have been a bonus. The trip would have been a bonus. The primary purpose of it was not to educate insurance men in Paris; the primary purpose of it was to hold out an alluring reward to make them work harder. It was part of their service.

Therefore, we conclude, that the trip was earned by the plaintiff, C. J. D. RUDOLPH, and was in the nature of a bonus, reward, and compensation for a job well done. As

compensation, the $560.00 value of the trip of the husband and wife was properly included in the income of plaintiffs for the year 1956.

Further, since the trip was primarily a pleasure trip in the nature of a vacation, its cost is personal to the husband and wife and therefore not deductible by them,

Recovery for the plaintiffs will be denied for the reasons above stated.

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18788

C. J. D. RUDOLPH AND IRMA M. RUDOLPH,
Appellants

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(June 27, 1961.)

Before JONES and BROWN, Circuit Judges, and DeVANE, District Judge.

PER CURIAM: The facts are set forth in the opinion of the district court. *Rudolph v. United States*, 189 F. Supp. 2. The applicable law is to be found in *Patterson v. Thomas*, F. 2d , decided by this Court on March 16, 1961.

No factual differences call for the application of a different rule or the reaching of a different result than in *Patterson v. Thomas*. The judgment of the district court is

AFFIRMED.

BROWN, Circuit Judge, Dissenting:

To what was urged by my dissent in *Patterson v. Thomas*, 5 Cir., 1961, F. 2d at [No. 18263, March 16, 1961]. I would add brief comments on a few matters bearing emphasis in this record.

The notion that this was one big happy company-paid-for-holiday in New York City where a formal session for the first half day was a mere tip-of-the-hat to give appearances of a working trip is simply unfounded. Mr. Rudolph, the Taxpayer, and his wife—a companion, co-worker, partner-in-fact in the business of life insurance business as well as fellow Taxpayer—had nothing to do with selecting the time, the place, or the program. All was planned, precisely as to moment, locality, event and eligible participants. Moreover, it was not, as the Government seeks to make it appear, a long trek for a half of a day's formal business activity. Those selected by Southland Life Insurance Company were required to travel together. This group of 293[1] made up of 151 men and 142 wives drawn from the South and Southwest were compelled to come to Dallas where they became passengers on "two convention special trains." The

[1]The breakdown was as follows: agents 102, wives 97; salaried field assistants 3, wives 3; assistant managers 2, wives 2; managers 17, wives 17; officers 27, wives 23.

trains departed on Tuesday, December 11. Nearly 48 hours later and about 3:00 p.m. Thursday, December 13, the trains were to arrive at Jersey City, New Jersey, where special chartered buses took the travelers to the Waldorf-Astoria. On Sunday morning similar buses took all from the hotel to the trains for the return trip by the convention special trains arriving back in Dallas some time on Tuesday, December 18.

It is not, therefore, a case of employees getting together for the half-day's session on Friday, December 14, with all remaining time free. Out of the approximately 149 hours from Tuesday, December 11, to Tuesday, December 18, in the neighborhood of 96½ of them were spent in enforced togetherness. It is neither an exaggeration nor does it require more than an amateur license as a lyrist to contemplate that with the rhythmic clickety-clack of the wheels as this train made its way to and from New York City and Dallas, each recipient was reminded of the company message in a syncopated way. And a part of that message was that the company intended that all who were asked to attend would do so. Of course in the psychological complex of a sales business this point was not made crudely. Where in *Thomas* management phrased it as "frowning" on any who declined the trip, Southland has euphemisms of equal portent. Its agency vice president, after stating that an agent indicating he would not attend was required to give an explanation, testified that "if he [the agent] doesn't have a proper reason it would be looked upon with serious displeasure."

This convention trip was meant for the agent's own good. Of course that was equated with the company's good for it was wise psychologically and ethically legitimate to conclude that what was good for the agents was good for Southland. The emphasis was not really the pointed one of increasing sales. That, and the company's benefit, was to come primarily from reassuring the agents that things were not really as bad as they seemed. High officials testified without contradiction that in the life insurance sales business where there are so many "turndowns" by prospects, it is essential to buoy up the spirits of these solicitors. This, experience proves is best accomplished through the constant, close association on an informal semi-social basis of many successful salesmen who have weathered and overcome similar discouragements.

The insidious purpose—here used with no moral overtones of disparagement—of the company's theme on the minds and wills of its captive audience, was exemplified in the most intense fashion by the Friday luncheon at the Hotel Waldorf-Astoria which ostensibly had no specific relation to selling life insurance. One of the nation's outstanding ministers and public speakers, renowned for his syndicated writings, television and radio appearances, was the luncheon speaker. But even this was not left to chance. The company, by letter, outlined to him the nature of the meeting and suggested that the talk be "of an inspirational nature, along the lines of achievement, success and happi-

ness that can be obtained through proper attitudes of faith and practices of the well-ordered personal life." After discussing the nature of a life insurance agent's work and the essential motivation of genuine service to his clients, management's estimate of the importance of these things was stamped by this conclusion in the letter. "Therefore, the degree of success and satisfaction obtained from his work depends not just entirely upon his knowledge of life insurance, but to a very large degree depends upon his attitudes toward his opportunities and his zeal to excel." It is not surprising that the agency vice president testified of this speech that this speaker "did a better job than I had hoped he would" and that the speaker "did mention something specifically about the work of an insurance man * * *" and "he knew more about it than I did."

Unlike *Thomas* which concentrated on the practice followed by that particular life insurance company, this record contains the uncontradicted testimony of the Managing Director of the Life Insurance Agency Management Association. This is an industry-supported organization interested in research, management consultation, education and training, and publications in the life insurance business. From his 30-years' experience in life insurance from the management point of view, this witness outlined why management would consider it good business to spend $84,000, as was done here, on such a convention for its leading agents. He emphasized the importance of personal contact in an informal setting among those who either were top flight

producers or had shown promise. This included the opportunities for intimate associations with high level executives under circumstances which afforded ample time free from the diversion of workaday problems were such meetings undertaken in home office surroundings during working hours.

Indeed, as in *Thomas*, the Government does not question this. It acknowledges, as it must, that this is a legitimate expenditure by the employing life insurance company. But it is precisely at this point that the whole matter reaches its climax: if an event is of such importance in management's eyes, it is certainly not something which the company considers the agent may accept or decline on a take-it-or-leave-it basis. In other words, what the company does for the agents' (and its) good is known by both to be important and expensive. What is tendered must be accepted unless there is a real good excuse. This record, therefore, reiterates with emphasis the actual, psychological, economic pressure of compulsion under which the agent (and his wife) are coerced into taking what is offered.

The future economic livelihood of an agent under a contract granting the employer the right of termination at will is the thing at stake. To take a trip to preserve that security is something not done primarily for personal enjoyment when the employee *must* take the income, *pay* tax on it, *spend* it precisely as *directed* by the *donor* and then treat it as though this were an ordinary personal junket of a family on a holiday. In a real and vital sense the money is

spent for business and business reasons only. It is indispensable. What is indispensable is certainly ordinary and necessary.[2]

In the realistic formula of "ordinary and necessary," life insurance agents under such compulsion should have like treatment accorded to others. Deductions have been allowed as "ordinary and necessary" to clergymen attending a church convention;[3] to expenses of an employee attending conventions of a related business group;[4] to a lawyer attending a meeting of the American Bar Association;[5] to a legal secretary attending the national convention of the National Association;[6] to physicians attending medical conventions;[7] to certified public accountants attending con-

[2]Both on this underlying issue and the subsidiary one of allocation and apportionment the relative cost to be able to attend the formal business sessions in relation to the total $560 attributed income, is substantial either on the basis of the husband alone or husband and wife together. In other words it cost Taxpayer alone a minimum of $215.41 to be able to attend the half-day sessions in New York. These facts are not disputed:

Expense	*Cost per person*	*Cost per couple*
Meals in New York		
1 breakfast	$ 2.00	$ 4.00
1 luncheon at Waldorf	6.00	12.00
Round trip train fare	119.40	238.80
Pullman cost	37.13	74.26
Rail meals	30.54	16.46
Baggage, porter & dining car tips	8.23	16.46
Hotel New York (1 day) (approximately ⅓ on basis 3 days actual cost)	12.11	24.22
	$215.41	$430.82

[3]Marion D. Shutter, 2 B. T. A. 23.

[4]Ratterman et al., 7 T. C. M. 476, affirmed without opinion, 6 Cir., 1949, 177 F. 2d 204.

[5]Ellis v. Burnet, D. C. Cir., 1931, 50 F. 2d 343.

[6]Rita M. Callinan, 12 T. C. M. 170.

[7]Robert C. Coffey, 1931, 21 B. T. A. 1242; Wolfe v. McCaughn, E. D. Pa., 1933, 17 A. F. T. R. 1007; Ray Upham, 1929, 16 B. T. A. 950; J. Bentley Squier, 1928, 13 B. T. A. 1223; Cecil M. Jack, 1928, 13 B. T. A. 726.

ventions;[8] to university teachers in attending conventions or scientific meetings;[9] to professional cartoonists attending political conventions;[10] to persons attending the Red Cross Convention;[11] to school teachers attending summer school;[12] to attorneys attending an institute on Federal taxation;[13] to employees sent to refresher courses to become more acquainted with new processes in the industry;[14] to a furniture store sending its buyers to the annual furniture mart;[15] to representatives to annual conventions of trade associations;[16] and to an insurance agent away from home on business.[17]

This Court recently held in *Williams v. Patterson*, 5 Cir., 1961, 286 F. 2d 333, that expenditures made by a railroad conductor on his layover period of six hours were deductible even though all of the activities could narrowly be classified as "personal activities." In doing so we said: "although most of these factors in a narrow sense affect the personal convenience of the traveler, the motivation for sleep and rest arises from the exigencies of the employment, the business demands of the employer, the relation of the employee to his employer. * * *" Then we concluded the correct rule to be that expenditures made "in order to meet the exigencies of his employment or the business demands

[8]Charles O. Gunther, Jr., 54,287 P-H Memo T. C.
[9]Alexander Silverman, 6 B. T. A. 1328.
[10]Jan N. Darling, 4 B. T. A. 499.
[11]Henry Cartan, 30 T. C. 308.
[12]Hill v. Commissioner, 4 Cir., 1950, 181 F. 2d 906.
[13]Coughlin v. Commissioner, 2 Cir., 1953, 203 F. 2d 307.
[14]Pacific Grape Products Co. v. Commissioner, 17 T. C. 1097 (reversed on other points, 9 Cir., 1955, 219 F. 2d 862).
[15]Finkenburg's Sons, Inc., 1952, 17 T. C. 973.
[16]I. T. 2602, 1931 Cum. Bull. 130.
[17]Summerour v. Allen, M. D. Ga., 1951, 99 F. Supp. 318.

of his employment" are properly deductible. 286 F. 2d 333 at 339-40.

The contemporary interest in possible legislation changes suggests that perhaps the understandable, realistic "ordinary and necessary" formula produces results unsatisfactory to the revenue, undesirable from a socio-economic point of view or impossible of orderly administration. That may be so but the remedy is for Congress. Until then we have to view the formula in the light of the facts. Here, in my judgment, these facts show an honest, legitimate, ethical expense. More than that these facts compel a finding of absolute business compulsion when viewed from the standpoint of the agent's economic security.

I therefore dissent.

JUDGMENT

Extracts from the Minutes

of June 27, 1961.

C. J. D. Rudolph and Irma M. Rudolph,

No. 18,788

versus

United States of America

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Brown, Circuit Judge, Dissenting

APPENDIX C

Filed
28th day of July, 1961

/s/ Edward W. Wadsworth, Clerk of the United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,788

C. J. D. RUDOLPH AND IRMA M. RUDOLPH,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(July 28, 1961)

ON PETITION FOR REHEARING

Before Jones and Brown, Circuit Judges, and DeVane, District Judge.

Per Curiam

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

Brown, Circuit Judge, Dissenting.

APPENDIX D

In the
United States Court of Appeals
for the Fifth Circuit

No. 18,263

GEORGE D. PATTERSON, Director of Internal Revenue,
Appellant,

versus

J. C. THOMAS AND MARTHA THOMAS,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

(March 16, 1961

Before RIVES, BROWN and WISDOM, Circuit Judges.

RIVES, Circuit Judge: The District Director appeals from a determination by the district court[1] [59-2 USTC ¶9734] that amounts paid by the taxpayer's employer to a hotel and a travel agency for accommodations, meals, and a sight seeing trip for the taxpayer and his wife did not constitute gross income to the taxpayer; or, if they did, then such amounts, together with expenditures for which the taxpayer was reimbursed by his employer, were deductible by the taxpayer as ordinary and necessary business expenses.

[1]The findings of fact and conclusions of law of the district court are not officially reported.

The taxpayer, J. C. Thomas, was employed during the relevant period as a field representative of the Liberty National Life Insurance Company. By meeting certain standards, the taxpayer qualified to attend and bring his wife to the Company's annual Torch Club convention,[2] which in 1956 was held at the Hotel Chamberlain, Old Point Comfort, Fort Monroe, Virginia.

To attend this meeting, the taxpayer and his wife departed from Birmingham on May 14, 1956, spent two nights en route at a place of public lodging, and arrived at the Hotel Chamberlain on May 16. Their return trip commenced on May 20. They spent one night at a public lodging en route to Birmingham, and reached home on May 21. The taxpayer and his wife traveled in their own automobile. Prior to his departure from Birmingham, the taxpayer received from his employer a check for $168.16, which was spent for transportation, meals and lodging to and from the Hotel Chamberlain.

The Company paid directly to the Hotel Chamberlain $103.40 for lodging and meals for the taxpayer and his wife at the hotel while attending the meeting. The Company also paid directly to a travel agency the sum of $12.92, representing the expenses of a sight-seekin trip to Williamsburg, Virginia, for the taxpayer and his wife. The aggregate expenses totaled $284.48. There is no question in this case as to the reasonableness of the amount of these expenses.

The Torch Club originated in 1931 and was composed each year of outstanding field representatives of the Company who

[2]The requirements for membership in the Torch Club are "based upon sales of new business and the conservation of old business."

had during the preceding year met certain established goals. The Company "required" those employees who were invited, and their wives, to attend the annual meeting of the Torch Club. Employees who qualified for the convention, but who failed to attend for any reason, did not receive any money or other thing of value from the Company in lieu of such attendance.

Those present at the Torch Club convention were expected to adhere to the scheduled program. The taxpayer and his wife participated in substantially all of the scheduled activities.[2] The taxpayer had no control over the program, the time, or the place of the meeting.

The schedule of activities at the Torch Club convention was as follows:

Wednesday, May 16:
1:30 Arrival.
1:30-5:00 "Renewing old acquaintances and making new acquaintances."
6:30 Company dinner and water show.

Thursday, May 17:
7:00-9:30 Breakfast with delegates.
10:00 Meeting (2½ hours).
Afternoon—No planned activity (Taxpayer played golf).
8:30 Movie.

Friday, May 18:
7:00-8:30 Breakfast with delegates.
9:00 Tour of Williamsburg and Jamestown.
8:30 Bingo.

[2]Taxpayer and his wife did not go to the motion picture scheduled for the evening of Thursday, May 17, as they had previously seen it. Nor did they stay "the whole time" at the water show held on Wednesday evening.

Saturday, May 19:
7:00-9:30 Breakfast with delegates.
10:00 Meeting (2½ hours).
Afternoon Boat Trip.
7:00 President's Banquet and Ball.

The appellants' position is that this trip to the Hotel Chamberlain constituted the prize in what, in substance, was an annual sales contest.[4] The taxpayer seeks escape from this determination along two routes.

Initially, the taxpayer argues that his employer's payments to him and to the Hotel and travel agency for his benefit did not constitute gross income to him. For purposes of determining whether these sums were income, we may treat the amounts paid directly to the Hotel and travel agency and the traveling expenses for which the taxpayer was reimbursed in the same manner. In both situations the taxpayer ultimately received only non-cash goods or services, paid for by his employer. Taxpayer claims these sums come within the rule of *Corliss v. Bowers*, 281 U. S. 376 (1930), and are not income to him since he had no "command" over them and was not free to expend them in any manner he saw fit. It has been established beyond question, however, that receipt by a taxpayer of benefits in a form other than cash may constitute income to him.[5] Appellee next argues that the $168.16

[4] In his welcoming speech, the President of Liberty National noted that the Company "officially abandoned all company-wide contests a few years ago." He went on to add that, "The only company-wide contest we have left, if it can be called a contest, is the Torch Club, and I do not classify that as a contest, for no one is forced to make it and no one is criticized if he fails to do so."

Gross income includes amounts received as prizes and awards. Section 71, Internal Revenue Code of 1954.

[5] See Section 61, Internal Revenue Code of 1954; Treasury Regulations §§ 1.61-2(d)(1), 2(d)(3). See also *Commissioner v. Glenshaw Glass Co.*, 1955, 348 U. S. 426, 432; *Commissioner v. LoBue*, 1956, 351 U. S. 243, 246.

advanced to him for traveling expenses and the sums paid directly to the Hotel and travel agency did not constitute gross income to him because they were expended for the "convenience of his employer." Taxpayer cites in support of this theory, Regulation 111, Section 20.22(a)(3) of the 1939 Code, which reads, in part, as follows:

> "If * * * living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be added to the compensation otherwise received."

It is clear from the words of the regulation itself and the cases relied on by appellee[6] that the "convenience of the employer" rule there referred to applies only to meals and lodging and does not exclude amounts paid to the taxpayer which he expended for gasoline, sight-seeing trips, etc. from the Code's broad definition of income. The fatal blow to taxpayer's position, however, is delivered by Section 119 of the 1954 Code, which enacts the "convenience of the employer" rule into law, but in a modified form. Under that Section, meals and lodging furnished by employers to employees are excluded from the gross income of the employees "only if

> (1) in the case of meals, the meals are furnished on the business premises of the employer, or
>
> (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment."

This Section is inapplicable to the sums in issue which were spent for meals and lodging enroute to and at the Hotel Chamberlain.

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[6] *E.g., Diamond v. Sturr, 2d Cir., 1955, 211 F. 2d 264* (reviewing history of the "convenience of the employer" rule); *Boykin v. Commissioner, 8th Cir., 1958, 280 F. 2d 249.*

Since the payments received by the taxpayer and his wife from his employer and the noncash goods and services received by the taxpayer and his wife as a result of payments by his employer were includible in the taxpayers' gross income, we must decide whether these amounts were deductible by the taxpayer as ordinary and necessary business expenses within the meaning of Section 162 of the Internal Revenue Code of 1954.

Treasury Regulations 1.162-2 (I. R. C. 1954) provide in part:

> "(b)(1) If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible."

Both parties agree that the crucial determination is whether the primary purpose of the trip was business or pleasure.

At the outset, it is important to note that the nature of the trip must be determined from the individual taxpayer's point of view, rather than from the viewpoint of his employer. To illustrate, an employer may find that the efficiency of his salesmen is greatly increased if he gives them a two-week, all-expense-paid vacation trip to Florida as a reward for increasing sales. From the employer's point of view, the

amounts he expends in providing the trip may be business expenses deductible by him.[7] But to the recipient, that trip is solely for pleasure. Although "connected with" his business, the salesman who goes on the Florida jaunt is receiving income, just as if the prize in the sales contest were a bonus, and the amounts expended in going to Florida and spending the two weeks there would be nondeductible personal expenditure. We note, therefore, that the deductibility of sums as business expenses by an employer is immaterial in determining whether the expenditure of those sums by their recipient is deductible by him as an ordinary or necessary business expense.

In determining whether the taxpayer's trip here under consideration was primarily for business or primarily for pleasure, we consider the following:

1. "*The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business* * * *."[8] The schedule of activities at Old Point Comfort reveals that, at the most, five hours out of the three and one-half days were spent in formal business meetings. The first of the two meetings consisted mainly of welcoming speeches, and a review by the President of the past year's activity of the Company, the latter being subsequently reprinted for general distribution. At the second meeting, two speakers did talk on subjects of an educational nature. But more time was spent on the sight-seeing tour alone than at both of these "business" meetings. In answer to this point,

[7] Expenses of this type would apparently not be deductible by a life insurance company. Section 803, I. R. C. of 1954.

[8] Treasury Regulations 1.162-2(b)(2).

the taxpayer forcefully argues that, although the schedule reveals much activity of a purely recreational nature, he sought as co-participants in those activities company officials and better salesmen than himself, who might, while "playing," provide him with information on improving his abilities. He testified that much of the conversation on the sight-seeing tour, the boat trip, and his golf game directly concerned his business. Were these the only facts on which the court had to base its judgment, the proper resolution of the issues in this case would be more difficult than we believe they are. We do think, however, that the low proportion of time spent in formal business meetings distinguishes cases such as *Coughlin v. Commissioner*, 2d Cir., 1953, 203 F. 2d 307, where the taxpayer, an attorney, was allowed to deduct the expenses of tuition, travel, board and lodging incurred in attending a federal tax institute at New York University.

2. *The convention was sponsored by the taxpayer's employer and its only participants were taxpayer's co-employees.* Taxpayer seeks to rely on cases such as *Alexander Silverman*, 6 B. T. A. 1328 (1927), which allowed a university professor to deduct the expenses of attending a scientific convention. In none of those cases, however, was the convention sponsored solely by the taxpayer's employer. This fact, we think, is some, though not conclusive, evidence that the convention was really a form of remuneration.

3. *The convention was held at a resort hotel.* The taxpayer argues that the number of people attending the convention was large, and that a location had to be found where all the conventioneers could be housed together. Although the evidence

is by no means conclusive on the point, it may well be that no hotel located closer to the home of the convention participants was capable of handling a group of that size.[9] But, the fact remains, the convention was at a resort hotel.[10]

4. *The attitude of the Company.* The Company looked on the trip as one primarily devoted to pleasure and sought to convey this impression to the participants. In making arrangement for the trip, a vice-president of the Company wrote to the Manager of the Hotel Chamberlain, that: "While we hold two business meetings during our four-day convention, business is secondary. The main object is to give our people a good time. Specifically, I would be interested in knowing the fishing accommodations." The next paragraph of that letter reads:

> "One thing that interests us about Old Point Comfort is the proximity to Williamsburg and other famous historical places. I would like to get some information relative to sight-seeing trips for the entire group. Another question I would like to clear up is relative to the weather during the month of May. Is it warm enough for outdoor activties or not?"

The vice-president's wife sent a letter to the wives of qualifying employees, in which she noted that:

> "The Virginia Peninsula has everything to offer for a vacation convention. It is the sightseer's paradise. One

[9]But see, *Rudolph v. United States, Civil No. 8317, N. D. Texas, 1960.*

In his welcoming speech, the President of Liberty National noted that: "This is an unusual meeting since it is being held here in Virginia, a state in which we do not operate * * * but it was felt that everyone would enjoy a trip to this historic part of the country."

[10]Among the facilities available to the conventioneers were: shuffleboard; horseshoes; ping-pong; billiards; pool; a heated outdoor, salt water swimming pool; a picnic area; and a television theater. In addition, the hotel was situated in "the center of historic Vriginia" with numerous spots for sight-seeing enthusiasts.

> whole day of the Convention will be devoted to a tour of Jamestown and Williamsburg, with a stop at the battlefield at Yorktown, where the surrender of Cornwallis to George Washington ended the Revolutionary War. There is so much to be seen!"

The letter concluded: "I hope you will have as much fun as we have had in planning this vacation for you." With reference to the employees, there was testimony that, "they consider it a reward. I hope they do. We have been trying to sell them on it for a long time."

We think that the foregoing factors establish that the primary purpose of the trip to the Hotel Chamberlain was pleasure.

Whether an expenditure is ordinary and necessary to a taxpayer's trade or business is usually a question of fact.[11] And "Where the trial has been by a judge, without a jury, the judge's findings must stand unless 'clearly erroneous.' Fed. Rules Civ. Proc., 52(a). 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum Co.*, 1948, 333 U. S. 364, 395."[12]

We are convinced that the findings of the trial court, to the effect that the payments in this case were not properly includible within the taxpayer's gross income, and that if so includible, they were deductible as ordinary and necessary business expenditures, are mistaken and thus clearly erroneous within the meaning of Rule 52(a), F. R. C. P.

[11] *Commissioner v. Heininger, 1943, 320 U. S. 467.*
[12] *Commissioner v. Duberstein, 1960, 363 U. S. 278, 291.*

The taxpayer will be allowed a pro rata deduction for the amount of time spent at the business meetings, but no deduction will be allowed for his travel expenses.[13]

It follows, as a matter of course, that deductions claimed by the taxpayer's wife will be denied *in toto*, since her presence at the business meetings which taxpayer attended had no bona fide business purpose from the viewpoint of the taxpayer.[14]

The judgment of the district court is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

[*Dissenting Opinion*]

BROWN, Circuit Judge, dissenting: I certainly concur that the amounts involved constituted income to the Taxpayers. The question is whether the amounts spent were "ordinary and necessary expenses paid * * * in carrying on any trade or business," §162(a), or ordinary and necessary "traveling expenses * * * while away from home in the pursuit of a trade or business," §162(a)(2).[15]

I am also in agreement that we are here concerned with Mr. and Mrs. Thomas as the Taxpayers. We must therefore view it from their standpoint. Deductibility to either of them

[13]Treasury Regulations 1.162-2(b)(1), quoted supra.

[14]Treasury Regulations 1.162-2(c).

[15]26 USCA § 162(a): "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including.

"(1) * * *

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *."

is distinct from the deductibility to "their" employer, Liberty National Life Insurance Company. I would not, however, go so far, as does the Court, to say that the deductibility status to the employer-corporation of the payments made by it "* * * is immaterial in determining whether the expenditure of these sums by their recipient is deductible by him * * *." For reasons which I undertake to develop the considerations making expenditures "ordinary and necessary" to the employer may be part and parcel of a business situation making the spending of such sums equally ordinary and necessary as to the recipient employee. In other words, the one is a factor influencing the other.

But I differ fundamentally as to the denial of full deduction to the husband for all of his expenses. The position of Mrs. Thomas is not so clear, but as to her also I think the expenses were deductible without proration.

I say fundamentally because deductibility depends on the statute, and not on what this or that particular court decision happened to hold. Consequently, I would not urge that our decision here is contrary to the cases pressed by Taxpayers.[16] These are but two isolated opinions in what has been described by one Court as a "formidable array of authorities."[17] A leading text more accurately calls it "a plethora of authorities"[18] especially in view of the aptness of the medical connotation that this is "a morbid condition characterized by an excess of blood in the body" of the law.

[16] *Coughlin v. Commissioner*, 2 Cir., 1953, 203 F. 2d 307; *Alexander Silverman* (1927), 6 B. T. A. 1328, discussed by the Court ___ F. 2d ___.

[17] *A. Giurlani & Brother v. Commissioner*, 9 Cir., 1941, 119 F. 2d 852, 855.

[18] 4 Merten's, Law of Federal Income Taxation § 25.01 at 5. Under 136 subheadings covering 390 pages of text, thousands of cases are listed in hundreds of footnotes.

A constant recurrence to the words of the statute "ordinary and necessary" in the light of general principles distilled from the mass of material will, in my judgment, put quite a different turn on the activities of these Taxpayers. A brief resume shows, I think, two things: First, the Court disregards these factors; and, second, it operates as a fact-finder to reach factual inferences contrary to those of the District Judge who saw and heard all of these witnesses.

To begin with the standard of "ordinary and necessary" concerns whom? The test is not what the Commissioner thinks ought to be necessary or ordinary, or what a court, or its judges, might consider proper. Fortunately for our economy, none of these has the responsibility for running the particular business—personal or corporate—whose income is so essential as a subject of taxation. The test is in terms of the specific taxpayer. It seeks to measure whether, as to him, the questioned expenditures are substantially related to his business venture whose object is making money.

We encounter no difficulty in this record in relating Taxpayer's usual activity to a "trade or business." As to this element Taxpayer's employment fits the simple test that "Every person who works for compensation is engaged in the business of earning his pay * * *."[19] And it is without dispute that as a field representative of this insurance company he had long conducted "the enterprise in good faith with an intention of making a profit * * *" and "of producing income"[20] for himself. Whether the expenditures in question are deduc-

[19]Id. § 25.08 at 20.
[20]Id. § 25.08 at 21.

tible turns on whether they were "ordinary and necessary." As to these statutory words "it has been said that" these "mean those expenses which economically are an integral part of a business * * *."[21] An expenditure "will ordinarily be considered 'necessary' if the expenditure is appropriate and helpful in developing and maintaining the taxpayer's business * * *."[22] Quite obviously, "the necessity involved is not absolute or inexorable."[23] Proceeding on the assumption that "a taxpayer will not incur an expenditure unless required or justified by the needs of the business," the "courts are slow to override the taxpayer's judgment as to the necessity for incurring the expenditure."[24]

This brings us to the companion term "ordinary" since the expenditure must be both necessary and ordinary. As we are dealing with an "ordinary" expense in the business community "Customs and practices * * * and form of speech prevailing in the business world of the taxpayer will usually furnish reliable guides * * *."[25] One thing is clear, the "concept of 'ordinary' * * * does not require that the expenditures be either habitual or normal in the sense that the taxpayer either makes or is required to make them often; the expenditure may be 'ordinary' even though unique or nonrecurring to the taxpayer affected."[26] Quite obviously, "the nature and

[21] Id. § 25.09 at 24, citing *Commissioner v. Doyle, 7 Cir., 1956, 231 F. 2d 635, 637*, that "integrality is the test."

[22] 4 Merten's § 25.09 at 24.

[23] Id. § 25.09 at 24-25.

[24] Id. § 25.09 at 25.

[25] Id. § 25.09 at 26.

[26] Id. § 25.09 at 27 and note 76.2: "An expense may be ordinary though it happen but once in the taxpayer's lifetime. *Deputy v. duPont, 308 U. S. 488, 84 L. Ed. 416, 60 S. Ct. 363 (1940); Campbell v. Fields, 229 F. 2d 197 (C. A. 5th, 1956).*"

scope of the taxpayer's business constitutes a factor of considerable importance."[27] For it "to be 'ordinary and necessary', the expediture must have some reasonably proximate relation to the customary conduct of the taxpayer's business."[28] After pointing out that the decisive distinctions are those of degree and not of kind for which there is no "verbal formula that will supply a ready touchstone" the Supreme Court has made a remarkable pronouncement. It is remarkable because it takes into account in vivid fashion that the statutory term "ordinary and necessary" is to be judged against the habits and customs of American businessmen whether those on the sidelines would consider them prudent or imprudent, wise or unwise. The Court states the statutory standard:

> "* * * is not a rule of law: it is rather a way of life. Life in all its fullness must supply the answer to the riddle."[29]

An eminent text sums it up this way.

> "All of the foregoing criteria and principles may be said to rest, at least in part, on any underlying implication. That implication is that whether an expenditure is both 'ordinary and necessary' will depend upon a determination as to whether a hard-headed businessman would have incurred it under like circumstances. That person is the so-called average hard-headed businessman and not necessarily the taxpayer himself. * * *"[30]

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[27] 4 Merten's, § 25.09 at 29.

[28] Id. § 29.09 at 31.

[29] *Welch v. Helvering, 1933, 290 U. S. 111, 115, 54 S. Ct. 8, 9, 78 L. Ed. 212, 213; id. § 25.09 at 28.*

[30] 4 Merten's, § 25.09 at 34. This Court has approved this approach. *Rittenberg v. United States, 5 Cir., 1959, 267 F. 2d 505, 508.*

How do the facts of these expenditures[31] and Mr. Thomas' business life match these principles? At the beginning is the bald fact that he had nothing to do with picking out Old Point Comfort, Fort Monroe, Virginia. One on a personal jaunt which is to be treated as a vacation normally has something to do with the selection of the place and the time. More than that, whether to go or not to go was not a matter of choice with him. He was not a free agent—unless, to play on words, he declined to go in which case he would indeed be a free agent—free of a job and free of Liberty National.

This convention had some of the earmarks of a prize. But it was more than that. It was a command appearance. Its importance is not for us to judge. That judgment was made by the employer, Liberty National. Those "invited" to the Torch Club were outstanding field representatives who had during the preceding year attained certain standards, evidenced high abilities, and made outstanding contributions to the Company. How much real freedom did one invited have to decline the bid? None at all, were he interested in his future employment or advancement.

The president of Liberty National so testified without contradiction:

> "Q. Does the company require those who qualify and are extended an invitation to attend these [Torch Club] conventions?
>
> "A. Well, we don't issue an order but in effect it is a requirement. They know good and well enough if they do not attend their chances of promotion is just nil.

[31]The amounts paid directly by the employer and those reimbursed to Thomas by the Company's advance are all attributed as income. Consequently, the questions in issue are the same as though the amounts were paid out of his pocket with no right of reimbursement.

"Q. Does the company expect the wives of the agents to attend?

"A. Yes sir."

How may this Court disregard the positive testimony that employees were required to attend? Certainly we may not do it on any inherent credibility flaws of the witness or his words. The District Judge credited this testimony and expressly found that Liberty National required these people to attend.[32] Do we mean to imply that while the president so stated, he really didn't mean it, or that there is no "proof" that the Company would have been so harsh to one who had the temerity to decline the King's command?[33] And if we presume to do so, from whence cometh our help or competence?

In the isolation of our judicial tower we are blind indeed to all that goes on in the busy dynamic world of commerce if we do not know—either generally or from what this record teaches—about the contemporary American institution of the "organization man."[34] He is more than a fictional character. He is a modern phenomenon. One weds a wife but he

[32]The Court formally found: '6. The Company requires those employees, agents, supervisors, superintendents, home office officials who are invited and their spouses to attend the annual meetings of the Torch Club. This requirement is not a condition of continued employment, but failure to attend without adequate reason is frowned upon and adversely affects his future promotion."

[33]Cf. *Ball v. Victor Adding Machine Co.*, 5 Cir., 1956, 236 F. 2d 170, 179 (dissent); Matthew 22:1-4.

[34]Nothing said is intended as a disparagement of Liberty National. Testimony of its high ranking officers shows that it is abreast with modern management practices, personnel relations, business psychology and the like. Likewise the Torch Club conventions were kept on a high plane. Unlike some others, this Company has not succumbed to the other American institution—the cocktail party—and no alcoholic beverages were served at any of its functions.

marries a corporation too. Every waking hour the company's needs, the company's business, the company's welfare is drummed into this person whose inner satisfaction are likewise finally warped into the corporate image through status symbols of job assignments, titles and prerogatives.

Is one enmeshed in this complex required to risk the decisive displeasure of his superiors by the affront of declining the great honor? Is he not to be judged by the atmosphere in which he exists? With economic consequences so awesome, is it not the risk itself—the very uncertainty of the consequences —which makes his "acceptance" of corporate hospitality a matter of sheer business necessity?

This Court would not hesitate to allow deduction in full if an employee were given a peremptory written order to attend under pain of dismissal or some other form of corporate banishment. That the compulsive pressure, or the genuine apprehension of them, are more subtlety exerted does not alter things. In either case the employee responds to the hospitality of the employer because this is essential to economic security and specifically to the retention of progressive employment.

The politicians, the moralists, the psychologists, the sociologists, the psychiatrists may all deplore what has come to pass, but this is, as the Supreme Court said, "a way of life," and it is that "life in all its fullness"—with all of its absurdities and social evils—that "must supply the answer to the riddle."

For to Mr. Thomas there really never was any riddle. He was faced with no conundrum. Once he was tapped he knew he had to go. His future was uncertain, his promotion frus-

trated, were he to exercise a choice. As with everything else at Liberty National, Old Point Comfort, the Hotel Chamberlin with its shuffleboard, horseshoes, Ping-pong, billiards, pool and picnic area were now to be the thing he wanted most. Once there, undoubtedly one would have fun. But the decision to go was compelled. It was compelled as a matter of business necessity. It is a pressure which people every day, everywhere in America now undergo. It is ordinary in all and the worst senses.

As American as Bedloe's Island, hot dogs, Grand Canyon, Rhapsody in Blue, Chatauqua, P.T.A., Golden Gate, Rose Bowl or Wagon Train is this institution of the organization man. Mr. Thomas, a victim and a beneficiary of that system, was under overpowering business compulsion to attend. To him the ancient question "to be or not to be" was resolved by the further one "to go or not to go." His productive future depended on the answer. As a good businessman with his ear to the ground, he did not have to wait until hearing the president testify in court that the "chances of promotion is just nil" to know what the answer would have to be.

Congress used two simple terms, "ordinary" and "necessary." They more than comprehend this situation.

The extent to which Mrs. Thomas, the wife, was absorbed into this corporate image serves a dual purpose. First, it shows why her attendance had a financial business purpose distinct from a holiday. Second, it is additional proof of the extent to which the daily life of the husband, the nominal

employee, was smothered by the predominate concern of what is best for the Company.

In this respect the Company was following another good American pattern that, to paraphrase an old hymn, "this is a woman's world." Women run the home. Women are the teachers, secular and religious. They are den mothers, pack mothers, tribe mothers and home room mothers. Women are the effective civic reformers. A male aspiring for high public office runs on or with his wife. And in the view of Liberty National the success of the husband-employee depends on the wife.

As with another woman this also begins at the beginning. Before an agent is hired, the District Manager must interview the applicant's wife in her home. Already the seeds of complete, unlimited, untiring, unshared loyalty are being planted.[35] She is given a booklet especially prepared for wives of prospective employees. The husband, if hired, is employed on a temporary basis for a trial period. At that time the wife receives a welcoming letter which transmits the President's message entitled "A Family Affair" which leaves little doubt that mother is in this too. After the husband passes his period of probation, the husband and wife each receive letters of notification that employment has become permanent. Again, nothing is casual or acci-

[35]The Agency Vice President testified:

"Q. If you decide to employ a man do you talk to his wife?

"A. We require that * * * our District Manager go into the home and interview the wife of every prospective agent before he is actually employed by the company. This is done to determine whether or not the man's wife would be sympathic and helpful to him in the business he is going to be in and also for him to explain to the wife the fact this is a business that has irregular hours."

dental. This letter transmits another booklet especially prepared for wives called "The Feminine Touch."[36]

But this Company does not risk another Paradise Lost so the barrage continues. The "Torch Magazine" each month, and District Manager Bulletins each week are mailed directly into the home and "in some instances the district managers mail them direct to the wives." It is no mere euphemism to regard the wife as "a partner to him in this business we are in." For in addition to this running pressure a special visit by managerial representatives is made each year in the home. In joint consultation with husband and wife the family's needs are reviewed with the Company representative and translated against required production through the use of Company prepared planning and budget forms.[37] What is wanted, what is needed, what may be had, finds common, single expression in the Company's welfare. As genuine as the employer's interest is, this is not

[36]The Agency Vice President described it:

"A. That booklet * * * we send to the wife at the time her husband becomes a permanent employee. The title of this book is 'The Feminine Touch' and it tells a wife in detail some of the things she can do and how she can assist her husband in becoming a successful life insurance man."

[37]The Agency Vice President stated:

"A. * * * We believe a man's wife is a partner to him in this business we are in. We definitely feel when we hire a man we hire his wife along with him. A particular example of that is once each year when we put out our program of progress, which is the basic compensation plan for the insurance year, the plans and so on of the company for the next year, we put out some planning forms and budget forms and our managerial people go into each agent's home and with this agent and his wife they make out their budget for the next year. And this form is so made that they convert his monetary needs into production that he must produce the next year. And then of course the wife and he together keep the records on how they are progressing during the year. So we take the wife very closely into our business.

regarded as corporate philanthropy. In the Company's eyes the key to the husband's success is the wife.[38]

All of this has a substantial bearing on tax deductibility. It, of course, affords ample basis for the Company to deduct its expenditures in wife cultivation. This does not automatically extend like treatment to the wife as recipient. But when the program is so well organized, the corporate wife propaganda so intense and continuous, is it not reasonable that husband and wife conclude it to be imperative that when the employer beckons, the wife must respond?[39]

In assaying this we need not consider it in terms of expenditures by the wife as such. Since the husband-employee's economic future is tied into the Company through the wife, and the Company expects the wife to attend, the cost of her travel and keep is an ordinary and necessary expenditure by the husband in his own right and not merely as a vicarious agent for her.

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[38]The Agency Vice President stated:

"A man's wife who is not sympathic with him in his business can have a tremendous influence on him. He would come home late and she would say why aren't you here on time, and he would say I am trying to make a living for you, an unappreciation of course that affects his morale."

Earlier he stated that less than 1% of unmarried men were hired. They rely on married men because "We find that this is a business * * * that requires an awful lot of a man. He lives in a unique type of atmosphere and he needs some ballast for his morale and it is our contention that a wife can assist tremendously and help him to keep his morale high and keep him moving and thinking positively about this business."

[39]It bears repeating that the President testified:

"Q. Does the company expect the wives of the agents to attend [the Torch Club]?

"A. Yes, sir."

The District Court categorically found that "The Company requires those * * * agents and their spouses to attend the annual meetings of the Torch Club. * * *." See note 32, *supra*. And to the wife this was not all free fun. She had the added expenses of a baby sitter, a maid and, of course, the fashionable new clothes.

Thus far what I have written sounds perhaps as though I think that the compulsory attendance of husband and wife was merely to satisfy the corporate ego. On the contrary, I think the evidence is overwhelming—and the Trial Court so found—that these hard-headed businessmen considered that money was spent by sandwiching in the ceaseless company pitch with the attractions found in a delightful resort area. In other words, it is certainly not for Judges situated where we are to say that no serious business advantage was obtained by Mr. Thomas. Until the Commissioner has to bear the financial responsibility for poor management decision, how is he to say that the participants will not obtain substantial help from this 3-day enforced togetherness as a captive group? Congress did not leave it to tax collectors or judges. The congressional test is in terms of the businessman's needs and practices. The ordinarily prudent or the ordinarily hard-headed businessman with a good deal of psychology on his side may well conclude that the "company message" can best be instilled by minimizing formal business sessions and expanding the so-called "free time" for each to receive new transfusions from others whose doubts, if they exist, will hardly be expounded in this atmosphere of good will. After all, on two of the days the day ended with the Company line being drilled in at Company dinners or banquets, and each day started bright and early with "breakfast with delegates" where the bill of fare most

likely was insurance as it would have been law had the participants been judges or lawyers.[40]

If the Company thought it important, if the Company required the husband (and wife) to be there, if the husband knew that he was expected and would suffer by not attending, his presence was important for two reasons. First, he would receive the benefits of this contact and instruction. Second, he would secure his job and economic future.

It is no answer to suggest that allowance of such deductions is open to abuse. There is scarcely anything in the complex tax law that is not. Abuses can be checked and prohibited by a determination of courts, either district or tax court, applying general principles to the facts at hand.

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[40]The Agency Vice President testified:

"Q. In planning these programs [Torch Club] what factors do you consider?

"A. Well just exactly what we are trying to do with our men, we are trying to motivate them to do a good job * * * and to use their potential ability * * *. More than that, attendance at this Torch Club gives the fellow an opportunity to know other outstanding men and exchange ideas with those people * * *. Knowledge of course is one of the purposes of the Torch Club. We of course have outstanding speakers to attend the meeting. And we try to give them instructions to go back and do an even better job when they get back home. One of the most valuable parts of the Torch Club convention is the fact that these agents come there and [get] to rub shoulders with other outstanding men in our company who are doing a good job and get the opportunity to exchange ideas * * *. And then the fact that they are there with the Home Office officials and the Directors of the company. * * * I think every man that attends a convention leaves * * * a little bit more sold on the company. I think this might be interesting as far as statistics are concerned. * * * We found that 60% * * * of our total agency organization have attended one of these Torch Club conventions and 83% of all of the men who terminated in our company have never attended one of these meetings. Eighty-three percent who terminated have never been there. So 17 percent is all who have terminated of the Torch Club organization."

Finally the disallowance of deductibility is contrary to the express regulation covering attendance of conventions.[41] And the Court's remand to allow a prorata deduction for Mr. Thomas' expenses while attending business meetings[42] is contrary to the express provision of § 162(2), see note 15, *supra*, that traveling expenses includes "the entire amount expended for meals and lodging * * * while away from home * * *."

The statute states that "The entire amount expended for meals and lodging" may be deducted. This, as we have recently pointed out in *Williams v. Patterson*, 5 Cir., 1961, F. 2d , [18371, Jan. 12, 1961], represents a congressional amendment to liberalize deduction to overcome niggardly rulings of the Revenue Service which attempted to limit deductibility to the *excess* of expenditures over those which otherwise would have been incurred. In addition, since the Court finds that Mr. Thomas was engaged in his trade or business while attending these business meetings, the question arises how did he get there? It is positive, and

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[41]Regulation § 1.162-2(d). "Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under § 162 depending on the fact and circumstances of each case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of the deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meetings so that he is benefiting or advancing the interest of his trade or business by such attendance. If the convention is for political, social, or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible."

[42]The Court states: 'The taxpayer will be allowed a pro-rata deduction for the amount of time spent at the business meetings, but no deduction will be allowed for his travel expenses." Citing in footnote 13 Reg. 1.162-2 (b)(1), —F. 2d—at—.

the District Court found, that attendance in business sessions was compulsory.[43] The expense of compulsory attendance was not therefore the Smithfield ham and grits for the Company breakfast. To be there he had first to get there. That meant travel and travel meant cost. The regulations cannot take away that which the statute expressly allows. Since, on this Court's finding, Mr. Thomas was engaged in "the pursuit of [his] trade or business" while attending required business meetings held at a place "away from home," he was most certainly entitled to deduct the entire cost for meals and lodging for each of the days on which such sessions were held. For like reasons the cost of actual travel is within the express terms of the statute.

In principle[44] the Taxpayer proved, as the District Court found, overpowering business compulsion and the deductions ought to have been allowed.

I therefore respectfully dissent.

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[43]The Court formally found "attendance of those present upon the scheduled program is required and plaintiffs did so attend."

[44]I have not undertaken to consider specifically the item of $12.92 for the sight-seeing trip to Williamsburg, Virginia. Perhaps other considerations apply as to it.

APPENDIX E

Management Trends, Page 15 (September 28, 1957):

"*What are the advantages of a national meeting?* Here are some of them:

1. *Concentration of best talent:* Your top executives, specialists and best salesmen are on hand to impart ideas.

2. *More spectacular:* With ingenuity you can make a national meeting an event to remember for not days, but years.

3. *Sharing of experiences:* Men with common interests and problems have an opportunity to swap ideas with the largest number of their contempories.

4. *More spirit:* As part of a large homogeneous group, salesmen can generate more enthusiasm and be inspired to a greater degree.

5. *Conservation of executives:* While a little more top executive time goes into planning, executives devote less time at a national meeting than a series of regional events which take them on the road."

Royal Bank of Canada Monthly Letter, Vol. 39, No. 2, page 1 (February, 1958):

"Conferences of all sizes and sorts are important in business life, in professional life, in politics and in the home. Many a person has been frustrated in carrying out his plans because he did not consult the people concerned, learn their ideas, and win their interest.

"The conference we are about to plan is not a convention of men and women who have come together for good cheer, but a meeting of people to discuss issues of interest to them, to contribute ideas, and to carry away thoughts that will be worth remembering.

"We live in a society of growing complexity, in which no one person can know all about anything. A conference brings together people with diverse notions and varied kinds of information. The exchange of thoughts and the pooling of ideas and the study of solutions—these are the essence of the conference method.

"There are subsidiary benefits, too. A conference will give the people who participate in it a better sense of identity. They will be confirmed in their partnership in a common effort. They will prove to themselves the benefit of convincing and persuading rather than overruling one another.

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"Do not lose sight of the splendid opportunity this gathering gives you to tap the creative resources of all these individuals who come to your conference inspired by fellowship in a mutual endeavor and stimulated by the exchange of ideas. Determine at the beginning to so shape your conference as to make the most of it. If people go away from your conference with the feeling of belonging to your organization in a valuable way, that is a bonus value that may be more important to your business than all the other conference benefits.

"This statement is true of all sorts of conferences, from the great trade association conference through those of individual businesses and professional societies, to the family conference. • • •."

Report No. 15, Life Insurance Sales Research Bureau (November, 1924) (Excerpts from same):

"One of the chief things to be accomplished by a convention is to secure unanimous understanding of the principles underlying the company's sales operations and the rules which experience has proved to be essential in carrying out those principles. There is no sales organization anywhere which has a complete and un-

animous grasp of these matters but a convention can do more to give the men that grasp than anything else. Home Offices are constantly under the necessity of formulating principles and rules, and they are similarly in a constant state of disappointment because they are not understood. The convention is the place above all others where this can be accomplished."

* * * * *

"The extent to which the Home Office arranges for transportation depends largely upon the situation of the convention city. If it is centrally located with many lines of approach, it would be impracticable to arrange for many men to meet on their way to the convention. But if the convention is to be held in an isolated spot, or one at considerable distance from the home of the majority of the members attending, then specific plans may be made for assembling at some nearer location and proceeding together to the destination. If this latter is at all feasible, it is desirable for several reasons. It gives the men a peculiar feeling of satisfaction to travel on a "special" train or on "special" cars, it encourages a friendlier feeling than is generally present at conventions at which the men arrive as strangers, it makes the men more anxious to get down to the real work of the convention when they arrive at their destination, and, above all, it has a decided educational value in its contacts and ever present business discussions."

* * * * *

"Today an ever increasing number of wives take a real interest in what their husbands do, and this interest is frequently referred to by men as being of very great value to them. In fact, it has been said that a wife can not usually be so wholly lacking in contact with her husband's work as to have no influence at all upon it.

"In many cases, this influence is negative rather than positive, and this is particularly true in the

careers of many life insurance agents because their work frequently involves evening appointments—a condition usually resented by a wife. Many a wife has thoroughly discouraged her husband because the only thing which she ever knew about his work was that he had to go out at night or that he had failed to 'write that ten' which would give her a new dress. She knew nothing about the bigger things which life insurance accomplishes and of which her husband was or could be a part. The recognition of the very great desirability of 'selling' the wife on her husband's job has spread rapidly in recent years, and today many husbands are helped over the rough spots of their career by the enthusiasm and vision of their wives, much of which can be aroused or increased at a convention."

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"Whether a convention is intended to provide instruction or to rouse company loyalty through inspirational talks, there is one thing which should run through all its preliminary plans and all its sessions, the spirit of cordiality and hospitality. As one company expressed it—'We always try to do just a little bit more for our men than they expect.'

"The public expects much of the life insurance business in the way of intelligent, prompt service, and this service is made up of that which is contributed by the Home Office as well as by the agent. The Home Office continually strives to improve both of these factors, and one of its best opportunities to show to its field force the kind of service which it is capable of rendering is at its convention.

"We have endeavored to describe in the preceding pages those items which appear to contribute to the smooth running of a meeting, but over and beyond such matters are the almost countless things which can be done for the pleasure of the visitors. From the moment when they first hear of the proposed meeting until they have returned to their desks, the company has innum-

erable, small opportunities to impress them with the fact that their company is far from a 'soulless corporation'. It is these human relations which steady and even inspire many a man in days of doubt and discouragement, in those days when he thinks that perhaps he is in the wrong business or in the wrong company."

Life Insurance Agency Management Association, *Motivation*, page 38 (May, 1958):

"Few insurance wives, particularly among the younger men, have the same apparent security as other women they know—their neighbors, their bridge club associates, their friends whose husbands have salaried jobs with title and regular hours in local industry or business. In many instances the agent's wife enjoyed this kind of stability in the not-too-distant past before her husband joined your agency. Until recently he was 'connected with the bank'—true, he did not make any money, but there was a certain sense of security and stability through such an association whether he was the janitor or the president. Now, he is a salesman. If he is a success, he will remain a salesman. Chances are he will never have a prestige title such as 'second vice president.'

"He may already have a full-time secretary; he may even have an assistant who prepares his security charts and bird dogs for him; he may even have a second girl taking care of his birthday cards, age-change letters, blotters, etc., but he will never have 50, 100 or 1,000 people working for him. On the other hand, unlike other professional men, he does not sit in his office and wait for people to make appointments to see him. He solicits business—even at the country club dance in a subtle way on Saturday nights! He works at night, either calling on prospects or studying after the children go to bed. The odds are probably one thousand to one that when Mrs. Agent was 18 and dreamed of her future

life, she certainly did not vision a life insurance salesman for a husband!

"To be sure your agent is making more money than the husbands of any of Mrs. Agent's friends. He has a lovely home in the best section of town; he belongs to the best clubs; he travels in the best circles, and entertains the nicest people. Your agent is happy in his work, proud of his calling and needs to apologize to no one. Let us hasten to add that Mrs. Agent is proud of her husband, shares his belief in the product, and often heaves a big sigh of relief that she did not marry that young engineer, or that good looking fellow down at the bank.

"Nevertheless, to the wife of the ten-year veteran as well as the starry-eyed wife of the first-time qualifier, going to a fabulous resort hotel, getting away from the children for a week, having breakfast in bed, and no dishes to wash—these are rewards that money could never measure.

A Higher Standard of Living

"It is gratifying to make Mrs. Agent happy, but what does it mean to you as an agency manager? It means that Mrs. Agent is going to have a much bigger concept of her husband's job; she is going to have a measure of that security and prestige that she wants; she is going to accept more graciously Mr. Agent's evening appointments and late dinners, and she will be ever so much better equipped to encourage and to help him during his temporary slumps.

"This experience does something else for the wife of a young agent. It exposes her to a higher standard of living. The comforts and luxuries at the convention she enjoyed. She wants more! She and her husband both have a sense of arriving, of accomplishment. They will never completely go back to their old world. These new desires, this new ego ideal will be translated into more

production and accelerated growth in this wonderful business.

"Let's make sure that our agents' wives are qualified too! And if under our convention rules men cannot qualify their wives through production, we can still encourage their attendance by helping the agent pay his wife's way through increased commissions for production well in excess of his quota.

"But there are disadvantages to conventions also: time out at a convention interrupts momentum. In order to qualify for the convention our men were organized; they were out seeing people; they were closing sales. The more of our agents who qualify for the convention, the more the agency will be disrupted by their absence. Conventions cost dollars; dollars in production loss as well as actual convention expenses for the company. Conventions cost dollars to the agent who brings his wife, who pays for a housekeeper for the children, who spends more money than he contemplated, and who also has lost one week, two weeks, three weeks of production. Knowing these problems as we prepare for a convention qualification period, we can plan to minimize them.

"One manager tries to make it easier for the wives to attend by running an agency contest during the convention qualification period. He gives three cash prizes each month based on paid premiums against percentage of quota. The prizes, however, are awarded not to the men but are sent to their wives earmarked for convention expenses! Hugh Bell sells the idea to his men of the wonderful opportunity a convention is to improve oneself. He tells them of the company leaders whom they can look forward to meeting from other parts of the country, of the ideas they will get. And in a later section of this chapter, we shall discuss ways of compensating for these disadvantages of loss of momentum, costs of travel, and loss of production."

From George E. Sokolsky, published in Miami Hearld (July 5, 1961) (Excerpt from same):

"One of the most important phases of American business activity is the convention, where men meet those who are in the same line or who have similar or associated interests. They listen to speeches on important subjects, often by government representaives. New ideas are widely circulated and products are exhibited. The convention is essential to the conduct of modern business because men live so far apart.

"Such conventions usually are held in large cities where there are suitable convention halls. Many large cities maintain convention bureaus to get the conventions to come to their cities."

Sales Meeting magazine, May 19, 1961:

"It's time that they stop playing with the fiction in Washington that conventions and sales meetings are a romp. In their zeal to prove that they are safeguarding our tax structure, our revenue 'experts' are tampering with a vital element of our economy.

"Conventions are not fun. Sales meetings are not outings. They are hard, serious events. They are part of our economy- a part that has contributed to our nation's economic strength.

"Our conventions, sales meetings and trade shows make us different from the nations abroad. These events reflect a difference in the way we do business, educate ourselves, and share our knowledge. Foreign nations have not had the advantage of our type of conventions and sales meetings. Only recently have they adopted what has been a strengthening factor in our economy.

"Let's not lose this advantage in the name of tax reform!

"Recent tax and court decisions have started what could be a dangerous trend. They would brand conven-

tions and sales meetings as doubtful business expenses. While the decisions are still few, they set damaging precedents.

"In their zeal to close tax loopholes, law makers and government administrators must be cautioned against considering meetings as something other than business. As an intelligent business executive, you should be alert to the need to maintain our convention, sales meeting and trade show efforts against damaging taxation.

"Several dangers grow from the new appraisals by our taxing authorities:

"1. To prove that meetings are strictly business, some meeting planners are over-packing their programs. They are bending over backwards to make meetings 'meaty' with an eye to the tax collector. What this does is to feed into a group activity more than the audience can digest. Recently, we've learned of meetings that challenge human endurance. There's just so much that the mind can assimilate without time out to relax.

"2. Some meeting planners are restricting their choice of meeting sites—against the best interest of meeting goals—because tax men look askance at meetings in luxury surroundings.

"We take exception, too, to the tax collectors' opinion of wives at conventions. Nobody who attends a meeting can assail the wisdom of including wives. Yet, tax-wise, you may suffer when they are included. Wives do more good for a convention and sales meeting than almost any element in the plans. They are a sound business 'investment' for any meeting—but our tax regulations militate against them. This is wrong!

"Let's not tax our conventions and sales meetings into impotence! Our nation has grown strong because of our well-developed communications through meetings and exhibits. Let's not sit by while zealots in Washington picture conventions as hell-razing parties, sales meetings

as indulgent vacations, and trade shows as tax-dodging schemes.

"What tax hawks have to learn is that they will lose, not gain tax dollars, with oppressive restrictions on meetings and trade shows. They will make it more costly for industry and the professions to disseminate product and technical facts. They will kill the advantages we enjoy from free flow of information.

"Imagine the cost to the nation if new developments in industry and the professions could not be rapidly spread through our established conventions and shows.

"If you have fears of foreign competition, consider the even greater threat if our communication arms were tied behind our backs through tax rules. While we might tax our direct communications into impotency, our foreign competitors are taking up our meeting techniques to beat us at our own game.

"Let us not be driven down the path being paved by the tax authorities. Conventions, sales meetings and trade shows must be kept strong and productive. To tax them into a straight jacket, we lose one of the greatest forces for an expanding economy that we have."

APPENDIX F

Section 61, IRC of 1954:

"Sec. 61. (a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

(b) CROSS REFERENCES.—

For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following)."

Section 62, IRC of 1954:

"Sec. 62. For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) TRADE AND BUSINESS DEDUCTIONS—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

(2) TRADE AND BUSINESS DEDUCTIONS OF EMPLOYEES.—

(A) REIMBURSED EXPENSES. — The deductions allowed by part VI (sec. 161 and following) which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer.

(B) EXPENSES FOR TRAVEL AWAY FROM HOME.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(C) TRANSPORTATION EXPENSES.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(D) OUTSIDE SALESMEN.—The deductions allowed by part VI (sec. 161 and following) which are attributable to a trade or business carried on by the taxpayer, if such trade or business consists of the performance of services by the taxpayer as an employee and if such trade or business is to solicit, away from the employer's place of business, business for the employer."

Section 63(a), IRC of 1954:

"Sec. 63. (a) GENERAL RULING.—Except as provided in subsection (b), for purposes of this subtitle the term 'taxable income' means gross income, minus the deductions allowed by this chapter, other than the standard deduction allowed by Part IV (sec. 141 and following)."

Section 161, IRC of 1954:

"Sec. 161. In computing taxable income under Section 63(a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in Part IX (sec. 261 and following, relating to items not deductible)."

Section 162(a), IRC of 1954:

"Sec. 162. (a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid

or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000."

Reg. §1.162-1(a):

"(a) In general. Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as a basis for a deduction or a credit under provisions of law other than section 162. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted

from gross sales in computing gross income. See § 1.61-3(a). Among the items included in business expenses are management expenses, commissions (but see section 263 and the regulations thereunder), labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see § 1.62-2), advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. No such items shall be included in busines expenses, however, to the extent that it is used by the taxpayer in computing the cost of property included in its inventory or used in determining the gain or loss basis of its plant, equipment, or other property. Penalty payments with respect to Federal taxes, whether on account of negligence, delinquency, or fraud, are not deductible from gross income. The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is nevertheless deductible even though such expenses exceed the gross income derived during the taxable year from such business. In the case of any sports program to which section 114 (relating to sport programs conducted for the American National Red Cross) applies, expenses described in section 114(a)(2) shall be allowable as deductions under section 162(a) only to the extent that such expenses exceed the amount excluded from gross income under section 114(a)."

Reg., § 1.162-2:

"§ 1.162-2. Traveling expenses.—(a) Traveling expenses include travel fares, meals and lodging, and expenses incident to travel such as expenses for sample rooms, telephone and telegraph, public stenographers, etc. Only such traveling expenses are are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incidental to travel are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including travel fares, meals and lodging, and expenses incidental to travel are business expenses. For the allowance of traveling expenses as deductions in determining adjusted gross income, see section 62(2)(B) and the regulations thereunder.

"(b)(1). If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductive only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible.

"(2). Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly related to his trade or business and subsequently spends an additional five weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of clear showing to the contrary.

"(c) . Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. The same rules apply to any other members of the taxpayer's family who accompany him on such a trip.

"(d). Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under section 162 depending upon the facts and circumstances of each case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not neces-

sarily prohibit the allowance of the deduction. The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance. If the convention is for political, social or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible.

"(e). Commuters' fares are not considered as business expenses and are not deductible.

"(f). For rules with respect to the reporting and substantiation of traveling and other business expenses of employees for taxable years beginning after December 31, 1957, see § 1.162-17."